

# **GUIDELINE F-15 (formerly 02-03)**

## **Financial Assurance**

Legislative Authority:

Environmental Protection Act, RSO 1990, Part XII Ontario Water Resources Act

Responsible Director:

Director, Economic Services Branch

Last Revision Date:

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### **SYNOPSIS**

This guideline identifies criteria for the use of financial assurance. The Ministry may impose financial assurance, in the form of cash, letters of credit, negotiable securities, or bonds, to ensure that various regulatory requirements are met. Such assurance may be imposed in the case of: Control Orders, approvals under the Environmental Protection Act and Ontario Water Resources Act, and decommissioning, clean-up, rehabilitation and decontamination activities.

More detail is provided in the "Financial Assurance (Part XII- Ontario Environmental Protection Act) A Guide".

### **1.0 Introduction**

Financial assurance may be imposed by the Ministry to ensure that recipients of orders and approvals issued under the Environmental Protection Act (EP Act) or the Ontario Water Resources Act (OWRA) comply in a timely manner with the stated terms and

conditions.

Financial assurance (FA) may also be required to ensure that funds are available for future decommissioning, clean-up, rehabilitation and decontamination activities.

It is the Ministry's intention to impose FA requirements in a consistent, equitable and effective manner while allowing flexibility in designing FA requirements.

FA requirements may be applied to new orders and approvals or to existing orders and approvals when they are extended, amended or renewed.

## **2.0 Definitions**

Financial Assurance (FA):

One or more of the mechanisms listed in Section 131 of the EP Act by which one party guarantees its performance to another party (such as the Government)

Approval: As defined in Section 131 of the EP Act

Order: As defined in Section 131 of the EP Act

Control Document:

A document which is authorized by statute, binding upon the recipient, and directly enforceable by prosecution

Regulated Party:

An individual, private company, corporation or other entity which is subject to an order or approval and must provide financial assurance

Guarantor:

A third party, such as an insurance company, which will issue an assurance or a surety bond

Program Director:

Ministry official who is responsible for developing, issuing and enforcing the order or approval or a designate; called the "Director" in the EP Act and the Ontario Water Resources Act; may be a Regional Director or Director of the Approvals Branch; Directors employed by local boards of health, regional municipalities and elsewhere outside the Ministry are, for purposes of contracts between the Minister and their employer under Part VIII of the EP Act, also Program Directors

Environmental Measures:

As defined in Section 131 of the EP Act

## **3.0 Scope**

Financial Assurance (FA) can be required as a condition of an order or an approval issued to a regulated party by the Ministry. For some types of orders or approvals, FA is a mandatory condition. For other types, a FA requirement is at the discretion of the Ministry Program Director who issues the order or approval.

From the point of view of a regulated party, FA is always required when it is a condition of an order or an approval.

### **3.1 Mandatory Requirement**

The following regulatory activities and legal requirement activities must have financial assurance as a condition of an order or approval:

A. Approvals under Part V, EP Act:

- i. private landfill sites:
  - \* for which a hearing is required under Section 30 of the EP Act; or
  - \* which will accept non-hazardous solid industrial, commercial or domestic wastes and which have a life-time capacity of at least 40,000 cubic metres (corresponding to 1500 people);
- ii. private transfer stations and waste processing sites for subject wastes as defined in O. Regulation 347, and PCB mobile destruction units;
- iii. private transfer stations and waste processing sites for other wastes where there is no identified place or practical method for final disposal in Ontario; (iv) private waste management (haulage) systems which carry biomedical and PCB subject (hazardous) wastes.

B. Approvals under Part VIII, EP Act: All unclassified, unregulated sewage systems treating commercial or industrial waste water;

C. Approvals under Sections 52 and 53, OWRA:

- i. private communal sewage and waterworks in unorganized areas where there is no agreement with the Ministry of Municipal Affairs for a local government agency (e.g., a local Services Board or a municipality to be created, or an existing municipality to be expanded) to take over the works in the event of a default;
- ii. (ii) private communal sewage and waterworks in organized areas without an agreement with the local government agency to take over the system in a default situation.

NOTE: Financial assurance is not meant to take the place of an agreement with a municipal authority for the long-term operation and maintenance of communal waterworks, sewage works and sewage systems. However, financial assurance must be provided until such agreements with a municipality are ratified.

### **3.2 Discretionary Requirement**

Activities for which financial assurance may be required, at the discretion of a Program Director:

A. Private landfill sites not referred to in Section 4. of "Financial Assurance (Part XII - Ontario Environmental Protection Act) A Guide".

B. Other Approvals under Part V, EP Act:

- i. reclamation or processing operations;
- ii. organic waste disposal sites (e.g., canning plant wastes);
- iii. incineration facilities;
- iv. private transfer stations and waste processing sites for wastes other than those referred to in 4.1.1.2;
- v. PCB storage sites;
- vi. waste management systems (haulers) which do not handle hazardous subject wastes; and
- vii. mobile waste processing facilities.

C. Approvals under Part VIII, EP Act:

- i. Class 7 sewage systems;
- ii. all Class 4, 5 and 6 sewage systems serving either industrial, commercial or institutional facilities for which financial assurance is not mandatory; and
- iii. Class A sewage systems.

D. Approvals under Section 53, OWRA:

- i. industrial and milling activities that generate tailings, ash or other waste materials subject to Section 53, OWRA; and (ii) any operation which discharges into surface waters.

E. Air approvals under Section 9, EP Act:

- i. storage of subject waste materials from air pollution control equipment; and (ii) Conditional Certificate of Approval requiring upgrading and where there is uncertainty as to whether the equipment will work.

F. Water Taking Permits under Section 34 OWRA:

- i. private undertakings which are likely to reduce the quantity or quality of water supplies of neighbours, and where conditions require remedial measures.

G. Control and other orders:

- i. industrial abatement programs under Section 18, EP Act;
- ii. where an industrial or commercial site, which is contaminated with hazardous materials, is to be decommissioned; and

- iii. operations which store subject wastes on-site under O. Regulation 347 for more than 90 days.

## **4.0 Criteria for deciding whether Financial Assurance should be required in an order on an Approval**

For those activities listed in Section 3.2, financial assurance may be required at the discretion of the Program Director, on the basis of one or more of the following criteria:

- a. where a required action, process or task could result in adverse effects or damages to property owners, the public, or individuals who are not employees and for which financial compensation may be required;
- b. when appropriate Regional Operations Division or Approvals staff determine that a facility or operation will require decommissioning, rehabilitation or environmental clean-up measures when it is to be shut down or modified in the future;
- c. when long-term and/or perpetual management or monitoring of an existing or potential pollution or contamination problem is required by an order or an approval;
- d. when there is reason to expect that the regulated party might become insolvent in the future and be unable to complete or comply with the conditions of an order or an approval;
- e. when a regulated party or person has been convicted of violations involving pollution discharges or emissions for the specific or related problems that are being addressed in an order or approval;
- f. when the regulated party has missed deadlines in previous orders or approvals;
- g. when the regulated party receives an extension to a compliance date; and/or
- h. when the regulated party's operation or waste residuals are judged to be "high risk" in that the release of a contaminant could cause serious health, environmental or property damage, including interference with the operation of private and municipal wells.

## **5.0 Forms of Financial Assurance**

Forms of financial assurance are specified in Section 131 of the EP Act and include cash, irrevocable letters of credit, surety bonds, transferable government bonds or other financial instruments agreeable to the Ministry.

## **6.0 Procedures for determining how much Financial Assurance is required.**

- a. Conditions of approval or order shall be defined by Regional Operations Division/Approvals staff;
- b. FA requirement shall be decided based on criteria specified in the "Financial Assurance (Part XII - Ontario Environmental Protection Act) A Guide" document.
- c. Amount of FA shall be derived from estimates of the costs of complying with conditions of order or approval;
- d. Cost estimates shall be supplied by approval applicants or regulated parties receiving an order;
- e. Ministry staff shall verify estimates or produce them if not provided by regulated parties;
- f. Guidance in estimating the costs of activities, facilities, etc. required by, or that must be implemented to comply with, orders or approvals, is found in Appendix A of "Financial Assurance (Part XII - Ontario Environmental Protection Act) A Guide".
- g. The recommended amounts of FA under different conditions are specified in Section 6 of "Financial Assurance (Part XII - Ontario Environmental Protection Act) A Guide".
- h. The actual, agreed-to amount, form and any special conditions of FA to be provided shall be determined through consultation with other Ministry staff and negotiation with the regulated party;
- i. Where FA is provided as time-limited instruments (i.e., in the form of irrevocable letters of credit, surety bonds, etc.), provisions in an order or approval and staff responsibilities for tracking shall be defined so as to ensure that instruments are renewed.

NOTE: Under certain conditions, only cash or eligible government bonds shall be acceptable forms of financial assurance.

## **7.0 Periodic Reviews**

As with other conditions of an order or an approval, FA requirements can be reviewed periodically and adjusted up or down in order to account for changing circumstances.

## **8.0 Defaults and drawing on Financial Assurance**

Specific conditions contributing to a default shall be clearly specified in the conditions of the order or approval. These conditions should include one or more of the following:

- a. the regulated party misses two successive deadlines in the compliance schedule;
- b. notice is received of proposed cancellation or non-renewal of a letter of credit or of some other form of financial assurance and a satisfactory alternative form of assurance has not been arranged (sufficiently) before the cancellation or expiry of the existing financial assurance; and/or
- c. notice is received of the impending insolvency of the regulated party or the surety.

## **9.0 Responses to a Default**

It is presumed that the regulated party has been given adequate notice of the conditions of the default, together with opportunities to rectify these deficiencies:

- a. If the FA has been given in bonds, an irrevocable letter of credit, or similar security, all or part of the FA amount may be claimed by the Program Director (with the appropriate authorization) and the proceeds transferred to the Consolidated Revenue Fund. Any interest that has been earned on this money shall accrue to the amount of the FA;
- b. Where FA or its proceeds is to be used to complete the action, facility or environmental measure is as specified in the order or approval, a Director's order is required to authorize such expenditure. This order can be appealed;
- c. The order or approval which requires posting of the FA shall specify, as conditions, the purposes to which the FA can be applied;
- d. If the FA is a surety or performance bond, or other type of agreement that is not readily convertible to cash, the provisions of the agreement that is part of a surety or performance bond shall apply. This may include hiring, by the Ministry, of a different contractor to carry out or complete the required works;
- e. Where facilities or sites are abandoned, FA shall be expended on required decommissioning, clean-up and other necessary tasks;
- f. Where it is not feasible to utilize outside contractors to complete required environmental works or measures as required by the order or the approval (e.g., where access cannot be gained to an abatement facility or where compliance requires a process change within a manufacturing plant), the Ministry shall realize on the assurance and withhold any funds until compliance is achieved. In the meantime, other enforcement actions and sanctions (e.g., prosecutions) may be applied.

NOTE: Copies of the Financial Assurance (Part XII - Ontario Environmental Protection Act) A Guide, can be obtained from:

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